

REMARKS

Applicants respectfully request reconsideration of the present application in view of the foregoing amendments and in view of the reasons that follow.

Status of the claims

Claims 24 and 26-51 were pending in the subject application, of which claims 49 and 50 had been withdrawn from consideration by the Examiner. With this submission, all but the “withdrawn” claims have been amended. No claims have been canceled or newly added. Hence, upon entry of this paper, claims 24 and 26-51 will remain pending in the subject application and claims 49 and 50 withdrawn from active consideration.

35 U.S.C. § 102 rejections

Claims 24, 26-35, 38-42 and 44-46 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent 6,426,110 to Almario Basa (“Basa”) as evidenced by “Alanate 385”, “14.0 Spray Drying”, and “Dairy Chemistry and Physics”. The Examiner alleges that Basa teaches creamer powders comprising Alanate 385, which comprises 95.5% protein (dry weight) and are alleged to form vacuoles entrapping gas on account of their preparation by spray drying. Applicants respectfully traverse the rejection.

Previously, Applicants explained that even if *Alanate 385* comprises 95.5% protein, Basa’s *creamers* do not. This is because Alanate 385 is but one component of several components (*e.g.*, carbohydrate, fat; *see* Abstract) required in a Basa creamer, and Basa is unequivocal that “[t]he creamer powder ... contains from about 40 to about 60 % by weight of a water-soluble protein” Col. 3, ln. 49-51. Hence, Applicants noted that even if Alanate 385 were 100% protein, the creamers of Basa would comprise no more than 60% Alanate 385. To make this distinction clear, which is not in dispute, the claims have been amended to, in relevant part, “a beverage foaming powder comprising at least 85% by weight proteins.”

In addition, Applicants respectfully submit that Basa’s “creamers” are not equivalent to the “foaming ingredients” claimed. The fact that Basa’s creamers may have application in a foaming beverage, as noted by the Examiner, does not render a “creamer” a “foaming ingredient”. The Examiner notes that Alanate 385 is a spray dried milk protein and concludes, therefore, that it “is a gas filled vacuole comprising air.” Office Action, page 4.

Even if so, no where does Basa teach that the creamer *per se* comprising Alanate 385 is spray dried.

Applicants' claimed "foaming powder" can be distinguished from mere "creamers" on a structural level. For example, "creamers" are not spray dried to form vacuoles (and/or filled with entrapped gas under pressure), even if, as in Basa, a component of a "creamers" may have been spray dried. To make this distinction clear, the claims are now directed to "a beverage foaming powder ... wherein dissolution of the powder in the beverage produces foam."

For at least these reasons, Basa cannot anticipate the claimed invention. Withdrawal of the subject rejection is respectfully solicited.

35 U.S.C. § 103 rejections

Claims 24, 26-48, and 51 stand rejected under 35 U.S.C. § 103(a) as being allegedly unpatentable over Basa as evidenced by Alanate 385, 14.0 Spray Drying, and Dairy Chemistry and Physics; and in view of U.S. Application Publication 2002/0127322 to Bisperink et al.¹. Applicants respectfully disagree.

A single prior art reference or a combination of references must teach or suggest each and every claim feature of the claimed invention to render a claimed invention obvious. In the present case, as expounded above, one of the cited references, either alone or in combination, teaches "a beverage foaming powder comprising at least 85% by weight proteins, the proteins forming the walls of vacuoles having entrapped gas, wherein dissolution of the powder in the beverage produces foam."

In fact, Applicants respectfully maintain that nothing in the art could have reasonably motivated one of ordinary skill in the art to specifically increase the protein concentration of a foaming ingredient to reach the present invention. Bisperink's disclosure, which specifically concerns maximizing foam production,² teaches a protein concentration "*preferably*" about

¹ The '322 publication is a national stage filing of an international "PCT" application filed *before* Nov. 29, 2000. Hence, this reference can only be "prior art" under 102(a) or (b) as of its publication date (Sept. 12, 2002), which disqualifies the '322 publication *per se* as prior art. M.P.E.P. § 706.02(f)(1). The '322 publication, however, claims foreign priority to EP 1074181 (published Feb. 7, 2001), which is already of record. Applicants have assumed, for the moment, that the Examiner intended to cite the EP document.

² See, e.g., paragraphs 0004-0005.

5% to 40% by weight.³ And even Basa's creamers of "high protein content" noted herein fall well short of the 85% content required of the claimed invention. Col. 2, ln. 15-25.

By moving well beyond any guidance known in the art, the present inventors arrived at a "foamer" having a foaming capacity that no artisan could have reasonably expected. For example, the foamers of the present invention achieve foam volumes 75% and 150% greater than the volumes of Bisperink's foamers in hot and cold beverages, respectively. See "comparative" Examples 2 and 3 of the application. Nothing in the art could have reasonably predicted such an outcome.

Withdrawal of the subject rejection is accordingly solicited.

Conclusion

Applicants believe that the present application is now in condition for allowance. Favorable reconsideration of the application as amended is respectfully requested. The Examiner is invited to contact the undersigned by telephone if it is felt that a telephone interview would advance the prosecution of the present application.

The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 19-0741. If any extensions of time are needed for timely acceptance of papers submitted herewith, Applicants hereby petition for such extension under 37 C.F.R. § 1.136 and authorizes payment of any such extensions fees to Deposit Account No. 19-0741.

Respectfully submitted,

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By



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³ Paragraph 0018.